IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.489 OF 1989

1. Namdeo Nivrutti Talekar

2. Harishchandra Janardhan Talekar

3. Janardhan Ganpat Talekar ..Appellants
(Original Defendants)

versus

1. Jagannath Nivrutti Talekar

2. Udhav Nivrutti Talekar

3. Nagarbai Nivrutti Talekar ..Respondents
(Original Plaintiffs)

Mr.A.P.Kulkarni for Mr.A.A.Kumbhakoni for the Appellant

Mr. Deshmukh for Mr. A.V.Anturkar for the Respondent Nos.1 and 3

Coram : S.R.Sathe, J.
Dated : 7th April, 2006

JUDGMENT:

1. Appellants, the Original Defendants in Regular Civil Suit No.109 of 1980 have preferred this second appeal against the judgment and order passed by the Additional District, Judge Solapur. in Civil Appeal No.134 of 1983, an Civil Appeal No.113 of 1983 whereby, he decreed the plaintiffs suit fully and held that the plaintiffs are entitled to 3/4th share in the entire suit property and

further directed partition of the said property. For the sake of convenience hereafter the parties shall be referred to as plaintiffs and defendants.

2. In order to appreciate the facts of the case it would be worthwhile to reproduce the genealogy set out in the plaint.

Nivrutti - Nagarbai (wife)
! Plaintiff No.3
!
_____
! ! !
Namdeo Jagannath Uddhav
(Deft.No.1) (Pltf. No.1) (Pltf.No.2)

Plaintiffs case in brief is that the suit land described in detail in paragraph 1 of the plaint are ancestral properties of deceased Nivrutti Jaywant Talekar. He died sometime in 1973-74. Plaintiff and defendants No.1 to 3 are the legal heirs of deceased Nivrutti. Thus, according to plaintiff, each of the plaintiff is having 1/4th undivided share in the suit lands bearing block No.58, 62, 66 and 96 situated at village Kim, Tal: Karnala.

After the death of Nivrutti the defendant No.1, Namdeo being eldest son got his name entered in the revenue record of the suit land and he even showed himself as the guardian of the plaintiff Nos.1 and 2 as at the relevant time they were minors. In fact, at that time the mother of plaintiffs 1 and 2 was alive and as such she was legal guardian. The defendant No.1 thereafter without the consent of plaintiffs 1 to 3 sold the suit property bearing block No.62 and 66 to defendant No.2, Harishchandra and property bearing gut No.58 to defendant No.3 by executing sale deeds on 2.5.1980. He sold the said property without their being any legal necessity and though the said transaction was not in the interest of the minor and for benefit of estate. Thus, according to plaintiffs, defendant had in fact no right to sale their share to the defendant 2 and 3 and as such they issued notice to the defendant No.1. and called upon him to give partition and separate possession of the suit property. As he refused, plaintiffs filed the present suit on 11.8.1992 for declaration that the sale deed executed by the defendant no.1 in favour of defendant Nos.2 and 3 in respect of the suit lands is not binding on their share i.e. 3/4th share

(together) and the same is not legal and valid. The plaintiffs also prayed for partition and separate possession of their 3/4th share in the suit property.

3. The defendant Nos.1 and 3 filed their written statement at Exhibit 11 and admitted the relationship between the parties and the fact that the suit properties were the ancestral properties of deceased Nivrutti. They, however, contended that plaintiff No.3 was never manager of the joint family property and initially deceased Nivrutti was Manager of the joint family of plaintiffs and defendant No.1 and after his death the defendant No.1 was the manager of the said property. In fact, during his life time deceased Nivrutti had executed an agreement to sale in respect of block No.76 in favour of defendant No.2 in the year 1972 and also handed over possession of the said land to him. After the death of Nivrutti the defendant No.1 being Karta of the said joint family sold the suit lands for legal necessity and thus the defendant Nos.2 and 3 became the owners of the suit lands. Besides this, they also contended that after the defendant No.1 became manager of the joint family he executed

the sale deed after obtaining consent of plaintiff No.3. Thus, according to them the said sale deeds are legal and valid and the defendant No.1 sold the said lands in order to meet the debt of the joint family. The defendant, therefore, contended that plaintiffs suit is not maintainable and they are not entitled to get partition and separate possession as prayed for. The defendants also contended that the suit is barred by law of limitation and principal of estoppel. Hence, on all these grounds the defendants prayed for dismissal of the suit.

4. The defendant No.2 filed pursis exhibit 12 and adopted the written statement of defendants 1 and 3.

5. On these pleadings the learned trial judge framed issues at Exhibit 13. In order to prove the suit claim plaintiff No.1 examined himself at Exhibit 31 and produced certain documents. As against this the defendant No.1 examined himself at Exhibit 33 and defendant No.3 examined himself at Exhibit 34. He also examined two other witnesses namely Nimbaji Talekar exhibit 35 and Sheikh Chand Exhibit 37 and produced certain documents.

6. After considering the evidence adduced by both the parties the learned trial Judge came to the conclusion that so far as the land bearing block No.66 is concerned, the agreement to sale was in fact executed by deceased Nivrutti in the year 1972 and thereafter in 1980 the defendant No.1 has executed the sale deed and as such the same is binding on the plaintiffs. He, however, held that the sale deed executed by defendant No.1 in respect of block No.58 is not binding on the plaintiffs. He, therefore, dismissed the suit against the defendant No.2 and declared that the sale deed dated 20.5.1980 by defendant No.1 in favour of defendant No.3 is not binding on plaintiffs and plaintiffs are entitled to get their 3/4th share and defendant No.1 got 1/4th share in the land bearing block No.62, 58 and 96. He also directed that if practicable, suit land bearing block No.58 be given to the share of defendant No.1 to the extent of his share.

7. Being aggrieved by the said order the original defendants filed Civil Appeal No.113 of 1983 while the original plaintiffs also filed civil appeal No.134 of 1983 as their claim in respect of

land block No.66 was rejected.

8. After hearing the arguments of both the sides, the learned first appellate Judge dismissed Civil Appeal No.134 of 1983 and allowed civil appeal No.113 of 1983 and decreed the plaintiffs suit entirely and declared that plaintiffs are entitled to 3/4th share in the suit property and accordingly gave direction for partition and separate possession.

9. Being aggrieved by the above mentioned order, the original defendants have filed the present second appeal. From the perusal of the record it is clear that while admitting the appeal this court (Coram :Daud, J.) has passed the following order:

> "Second appeal admitted on the limited question whether the transaction in respect of block No.66 bound the respondents for which reasons they could not seek share therein".

10. In this appeal before me the learned Advocate for the Appellants/original defendants has

urged only two points. Firstly, he submitted that the deceased Nivrutti was the karta of the joint family of plaintiffs and defendant No.1 and as such he had right to sell property when there was legal necessity. He had therefore executed an agreement to sale in the year 1972 in favour of defendant No.2 Harishchandra Talekar and had put him in possession of the suit land. So, in order to complete the said transaction if defendant No.1 has executed the sale deed then the same is binding on the plaintiffs. However, the first appellate court has lost sight of this fact. Secondly, he canvassed before me that as admittedly the defendant No.2 had received the possession of the suit land by way of part performance the defendant no.2 is entitled to protect the said possession and as such no decree for partition and separate possession in respect of the suit land can be passed in favour of plaintiffs. As against this the learned Advocate for the respondents/plaintiffs supported the judgment and order passed by the first appellate Court.

11. The relationship between the parties is not in dispute. Admittedly, deceased Nivrutti was the karta of joint family of plaintiff and defendant

No.1. Being Karta he had certainly right to sell the joint family property for legal necessity of the joint family or for benefit of estate, but the main question is whether the agreement to sale executed by deceased Nivrutti as well as defendant No.1 in favour of defendant no.2 in the year 1972 (Exhibit 36) were in fact for legal necessity of the joint family. Not only that, but it must also be seen as to whether he agreed to sell the said property in his capacity as Karta or manager of the joint Hindu family. While considering this question, if we peruse the said agreement dated 31.10.1992-exhibit 36 then we find that in the year 1972 he agreed to sell land admeasuring 3 acres 6 gunthas for Rs.475/- only after accepting the earnest money of Rs.200/- and handed over the possession of the said land to defendant No.2. It is very clear from the said agreement that it was not executed by deceased Nivrutti in his capacity as Manager or Karta of the joint family. Besides this, it is also nowhere mentioned in the said agreement that there was any legal necessity for the joint family or that the transaction in question was for the benefit of estate. There is absolutely nothing in the document from which one can even infer that the transaction

must have been entered to meet the legal necessity. There is even nothing in the document which would suggest that at the relevant time the joint family was in need of any such funds and for that purpose it was necessary to sell the property in question.

12. When such is the position, it cannot be said that whatever transaction deceased Nivrutti had entered into was for the joint family in his capacity as Karta of the joint family and for the legal necessity of the joint family. The provisions of Hindu Law are very clear on this point. Clause 255 of Mulla's Hindu Law reads as under:

> **255. Who may alienate coparcenary property-** The following persons alone have power to alienate coparcenary property so as to pass a good title to the alienee:-
>
> (1) the whole body of coparceners, where they are adults;
>
> (2) the manager, to the extent mentioned in Clause 242;

(3) the father, to the extent mentioned in clause 256;

(4) a sole surviving coparcener in the circumstances mentioned in clause 257.

No other coparcener is entitled to alienate coparcenary property so as to bind the other coparceners unless he is authorised by them to do so."

13. Similarly, if we take into consideration the provisions of clause 256 then also it is very clear that deceased Nivrutti being father had also no right to alienate block No.66 in the manner in which he has entered into an agreement with defendant No.2.

14. Once it is said that deceased Nivrutti had in fact no right to enter into agreement to sale in respect of undivided share and other co-parceners by executing exhibit 49. It must be held that there was no obligation on defendant No.1 to complete the said agreement. What is more to be noted is that the said agreement was executed in the year 1972 and

admittedly thereafter at no point of time the defendant No.2 had filed any suit for specific performance of agreement to sale against deceased Nivrutti or his sons including defendant No.1. So, the contention of the defendant No.1 that as the agreement was executed by his father he was bound to complete the said transaction is not legal and correct.

15. Though, feeble attempt has been made on the part of the defendants to show that the transaction in respect of block No.66 was entered into for legal necessity, from the perusal of the judgment of the trial Court as well as of the Appellate Court it is quite evident that the defendants have miserably failed to adduce any cogent evidence to show that at the relevant time the joint family of the plaintiffs and defendant No.1 was in fact in need of money and there was legal necessity and compulsion on the part of the manager to sell the property in question or that the transaction was for legal necessity or benefit of estate. The finding of fact recorded by both the courts below on this point is unassailable. So there is no substance in the argument advanced by the learned Advocate for the Appellant defendants

that the transaction regarding block No.66 was entered into for legal necessity of the joint family.

16. There is also no evidence worth the name to show that the defendant No.2 had in fact made any query while entering into an agreement with Defendant No.1 or his father and thereafter while getting the sale deed executed from defendant No.1. So, there is nothing on record as a result of which one can say that the defendant No.2 is the bonafide purchaser for value without notice.

17. Much is made about the fact that defendant No.2 had received possession of the block No.66 under the Agreement to Sale executed by deceased Nivrutti vide Exhibit 49 on 31.10.1992. The learned Advocate for the Appellant, therefore, submitted that though Defendant No.2 had not filed suit for specific performance of the agreement to sale, as per the provisions of Section 53A of the Transfer of Property Act, he is entitled to protect the possession of the said land. For this proposition he has placed reliance on case **Ranchoddas Ramnarayan Pandey vs.Manubai Vol.LV Bom.LJ 890.** In that case

it was held that defendant was entitled to rely upon Section 53A of Transfer of property Act and protect his possession. However, the facts of the said case and the facts of the case in hand are quite different. In that case a Hindu died leaving behind surviving his widow and two sisters. The widow entered into an agreement to sale with defendant regarding her husband's property for legal necessity. After death of widow before completing the sale, her husband's two sisters who were reversioners sold the property to third person, plaintiff in that case. When the said person, plaintiff, filed suit, defendant took the contention that he was ready and willing to perform his part of the contract and that he was put in possession by way of part performance. So, under such circumstances, the Apex Court held that the defendant is entitled to protect his possession under Section 53A of the Transfer of Property Act. However, in the instant case as mentioned above, there is no evidence to show that the transaction entered into by deceased Nivrutti and thereafter by defendant No.1 was for legal necessity or for benefit of estate. Besides this, there is also nothing on record to show that the defendant No.2

was and is ready and willing to perform his part of contract. On the contrary, right from 1972 till today he never filed any suit for specific performance. So, the question of defendant No.2 claiming protection under Section 53A of Transfer of Property Act does not arise.

18. The learned Advocate for the defendant has also laid his hands on a case **Shrimant Shamrao Suryavanshi vs. Pralhad Bhairoba Suryavanshi AIR 2002 SC 960** to show that the defendant is entitled to get protection under Section 53A of the Transfer of Property Act. It is true that in the said case the Apex Court has observed that possession of the defendant over the property is protected even if period of limitation for bringing suit for specific performance of agreement to sale has expired. However, the Apex Court has further specifically observed that for having such protection of Section 53A defendant is required to fulfil the following six conditions.

(1) there must be a contract to transfer for consideration any immovable property;

(2) the contract must be in writing, signed by the transferor, or by someone on his behalf;

(3) the writing must be in such words from which the terms necessary to construe the transfer can be ascertained.

(4) the transferee must in part performance of the contract take possession of the property, or of any part thereof.

(5) the transferee must have done some act in furtherance of the contract; and

(6) the transferee must have performed or be willing to perform his part of the contract

19. As already mentioned by me above, from the evidence on record it is very clear that the condition Nos.2 to 6 are not at all fulfilled in the instant case. So, the provisions of Section 53A of the Transfer of Property Act cannot be invoked. Thus, having regard to all the facts and circumstances of the case as well as the position of law, I have no hesitation to hold that the defendant

No.2 is not entitled to protect the possession under Section 53A of transfer of Property Act and the First Appellate Court has rightly held that the transaction entered into in respect of Block No.66 by Nivrutti or by Defendant No.1 is not binding on the present plaintiffs and as such they are entitled for 3/4th share in the same. Thus, there is no substance in the appeal. The appeal is dismissed with costs.

(S.R.Sathe, J.)